

No. 14,096

IN THE

United States Court of Appeals  
For the Ninth Circuit

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NG YIP YEE,

*Appellant,*

VS.

BRUCE G. BARBER, District Director, Im-  
migration and Naturalization Service,  
San Francisco, California,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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**FILED**

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*To the Honorable William Denman, Chief Judge,  
and to the Honorable Circuit Judges of the United  
States Court of Appeal for the Ninth Circuit:*

A decision was entered in the above entitled cause on the 24th day of December, 1953, dismissing the appeal and affirming the decision of the trial Court.

It is the affirmed belief of your petitioner that this Court has made an error in the facts and issues, and as a consequence an erroneous finding and rule of law followed.

The erroneous inferences from the facts:

(1) The Court inferred that possession of a passport by Ng Yip Yee was equal to or similar to possession of a certificate of identity.

(2) That Ng Yip Yee, a citizen in possession of a certificate of identity, was seeking admission to the United States as an alien claiming to be a national of the United States.

The erroneous ruling:

(1) That the terms of the Immigration and Nationality Act of 1952, Sec. 360(c), are applicable to a citizen bearing a passport.

(2) That a citizen bearing a passport is subject to an administrative hearing and attendant incarceration.

(3) That *United States v. Sing Tuck*, 194 U.S. 161, is applicable to the case of Ng Yip Yee, who seeks admission as a citizen, and who already sustained a burden of proving his citizenship before the administrative agency of the Secretary of State.

(4) That *Florentine v. Landon*, 206 F. 2d 870 (Cir. 9), presents a different fact situation than the instant case of Ng Yip Yee, which is not properly the subject of an administrative hearing.

(5) That the *United States ex rel Zalunic v. Uhl*, 144 F. 2d 286 (Cir. 2), was erroneously applied for the same reasons as set forth in number 4, supra.

**ARGUMENT.****THE ERRONEOUS INFERENCES FROM THE FACTS.**

Your petitioner is indeed reluctant to impress this Honorable Court that it erred in the findings of fact upon a subject that this Court has been long familiar with and upon which this Court has countless times ruled. However, the case of Ng Yip Yee is unusual and novel; it is without doubt a case of first impression, and for this reason alone I am encouraged in bringing to the attention of this Honorable Court its own error.

Prior to the enactment of the Immigration and Nationality Act of December, 1952, the method, procedure and conduct of a national born abroad and claiming United States citizenship through his parent, seeking entry to the United States, was to present himself to the American Consul and set forth his claim to United States citizenship, setting forth the fact of offspring of an American citizen. If the Consul found the claim was made in good faith, a certificate of identity would be issued, and the claimant would travel to the United States. Upon arrival in the United States the applicant was thereupon detained and subjected to an administrative hearing for the purpose of establishing his claim to citizenship.

In this type of case, there were no provisions in force whereby any government agency could make a determination to a claim of citizenship and issue a passport to a national prior to his arrival at a port of entry in the United States. This situation prevailed as of December, 1952, and dates back until the

time of the action entitled *United States v. Sing Tuck*, 194 U.S. 161.

The determination of the claimant's right to citizenship fell properly upon the Immigration and Naturalization Service, an administrative agency, and a writ of Habeas Corpus was the remaining remedy upon completion of the administrative hearings, prior to December, 1952.

Counsel for the appellee vigorously categorized the fact situation of Ng Yip Yee with the method above described. Counsel for the appellee sought to disregard the value, significance, and solemnity of an American passport by reminding the Court that it was just another "travel document", that it was similar to a certificate of identity, and that a passport was issued to an alien simply to enable the person to travel to the United States for the purpose of a hearing by the administrative agency, to determine said person's status.

Since the enactment of the Immigration and Nationality Act in December, 1952, and referring specifically to sec. 104(a), (b), (c), (d), (e) and (f) of the said Act, the Consul of the United States at Hong Kong, as an agent of the Secretary of State, has the power to hear, examine and determine a claim to citizenship.

Ng Yip Yee presented himself to the Consular Office and was given a hearing and examination, at which time evidence consisting of photographs, bank drafts showing support by his father, family



correspondence, family group photographs, father's income tax returns, affidavits of sisters and brothers who are ex-servicemen, and blood test reports.

It is well to note that upon investigation of the Ship's Manifests of the American President Lines for the year 1953, we find that Ng Yip Yee was the only person bearing a passport, among hundreds of other citizens bearing passports arriving from Hong Kong, who was forced to suffer detention and submit to an unlawful administrative hearing. This is certain evidence that the method of processing claimants to citizenship has been radically changed since the enactment of the "McCarran Act", so-called, and hereinabove cited, in December, 1952. Therefore, when a passport is issued to a claimant to citizenship, said person has the right to enter the United States as a citizen, subject to the usual rules of inspection, as distinguished from a person who enters merely with a certificate of identity and who has not been residing in the United States, and who has not been adjudicated a citizen and is subject to the detention and examination by the Immigration Service.

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#### THE ERRONEOUS RULINGS.

This Honorable Court thereafter relied upon section 360(c), Immigration and Nationality Act, 8 U.S.C. 1503(c).

This section provides specifically for a person who is in possession of a certificate of identity and does

not apply to a person who is in possession of a passport.

Subsection (c) must read with subsection (b) and is not applicable to Ng Yip Yee, who made an application for a passport, and after sustaining his burden of proof, the Consul by and through the Secretary of State issued to Ng Yip Yee a passport and declared him a citizen of the United States.

Subsection (c) does not apply to the entire act, but must be read with subsection (b).

“(c) A person who has been issued a certificate of identity under the provisions of subsection (b) \* \* \* shall be subject to all the provisions of this act, relating to the conduct and proceedings involving aliens.”

Subsection (b) is limited to persons whose claim to citizenship was denied and then only to persons who had previously resided in the United States or who are under sixteen (16) years of age and born abroad of a United States citizen parent. Subsection (b) provides for the issuance of a certificate of identity to such persons who must have instituted an action under the provisions of 28 U.S.C. 2201 for a declaratory judgment (sec. 360 (a)).

Therefore, Ng Yip Yee being over the age of sixteen (16), born abroad of a United States citizen parent, never having previously resided in the United States, having made no application for a certificate of identity, having instituted no action under 28 U.S. C. 2201, and not having been denied a right or claim to citizenship, clearly does not come within the purview of sec. 360(c).

On the contrary, Ng Yip Yee made an application for a passport, is over the age of sixteen (16), and was not denied any rights of a citizen, but was adjudicated a citizen and was issued a valid passport.

Again, your petitioner wishes to stress with emphasis the significance of sec. 104(a)(3) which clearly defines the jurisdiction and powers of the Secretary of State, in determining the nationality of Ng Yip Yee as distinguished from sec. 103(a), which clearly defines and limits the jurisdiction of the Attorney General with respect to citizens of the United States and that the Attorney General has used his powers in unlawfully detaining Ng Yip Yee and refusing to recognize his rights of an American citizen, by submitting Ng Yip Yee to an unlawful administrative remedy which should not have been instituted, let alone exhausted.

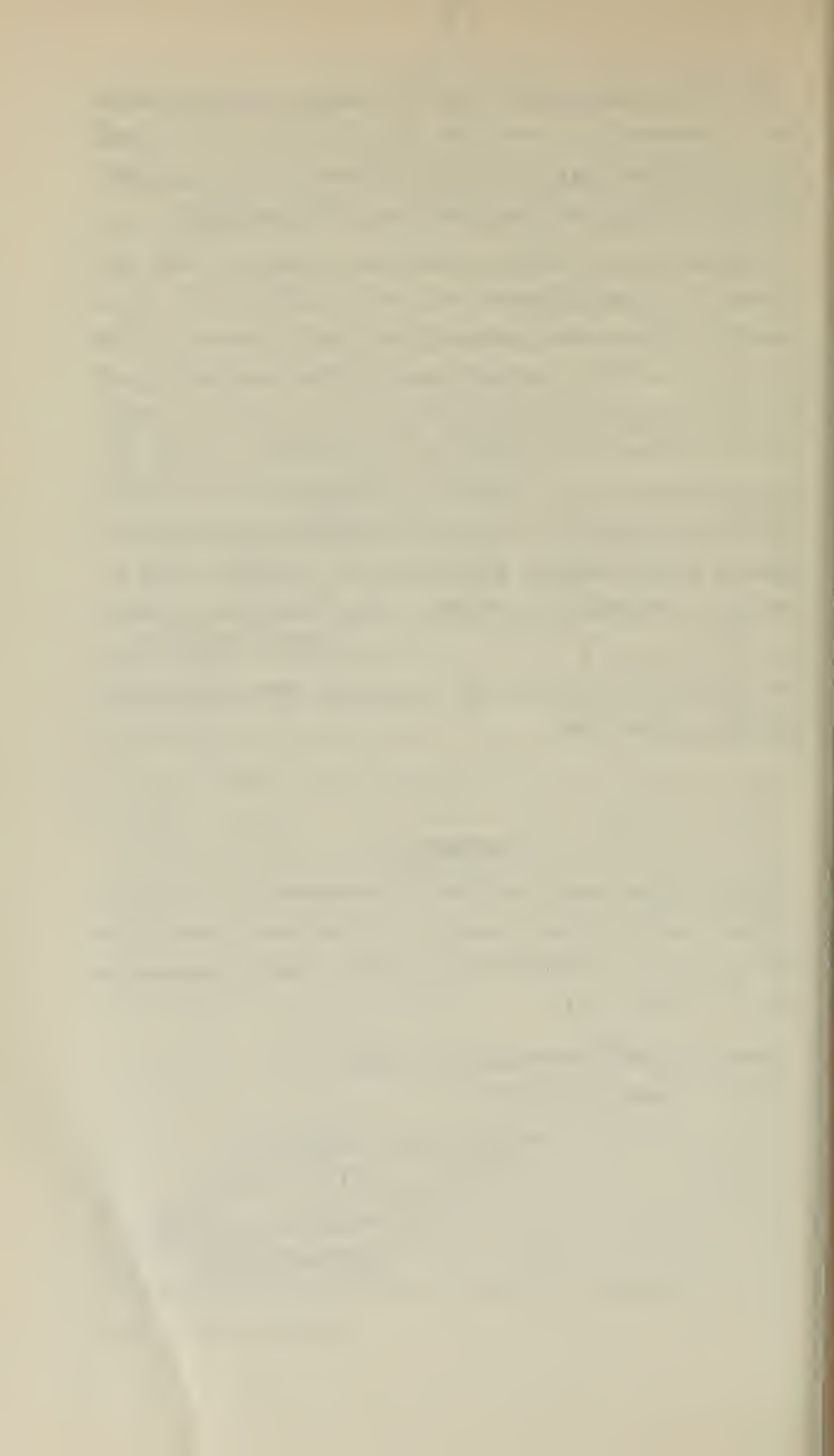
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### CONCLUSION.

May I again ask the Court to reconsider its ruling on the basis of the novelty of this case, under the "New Laws" of the Immigration and Nationality Act, 8 U.S.C. 1101.

Dated, San Francisco, California,  
January 18, 1954.

Respectfully submitted,  
SALVATORE C. J. FUSCO,  
*Attorney for Appellant  
and Petitioner.*



CERTIFICATE OF COUNSEL

I, the undersigned, hereby certify that I am the attorney for Ng Yip Yee, the detained, in the above entitled action, and it is my sincere opinion that the foregoing petition for a re-hearing is based upon substantial questions of fact and points of law, and that said petition for a re-hearing is not interposed for purpose of delay.

Dated, San Francisco, California,  
January 18, 1954.

SALVATORE C. J. FUSCO,  
*Attorney for Appellant  
and Petitioner.*

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